of December in respect of the year for which it was issued. The licence form should be substantially in the form found in Schedule V to the Land Rules. In fact the form used and issued to the appellant is not exactly as set out in the schedule which clearly sets out that the holder

'is hereby authorised to occupy the land hereunder described until December 31st of the current year for the purpose of in consideration of the payment made by him in advance as set out below.'

It follows that a licence is only valid for the period commencing with the payment required by the form until the 31st December in each year. The actual form used states:

"This licence is not transferable and may at any time be cancelled by the Collector."

It goes on to say:

"This licence is not valid beyond 31.12.56 unless renewed. If renewed a separate official receipt showing the period of validity of the renewal must be obtained for each renewal."

Since therefore the payment required by the Collector is a condition precedent for the grant of the original licence it is also a condition precedent to the grant of any further licence in respect to the same land, and since the receipt is required to show the period of the validity, the renewal must date from the date of payment only. Therefore a temporary occupation licence holder to be safe must make payment in respect to any renewal that he seeks on or before the 1st January in each year. If he does not, then since his licence has expired he is in unlawful possession of State land until he does make payment. And if he does make late payment, the period of the licence is not backdated to the 1st January in any year but the renewed licence commences again on the date of payment.

When the appellant sued out his summons in the Sessions Court on the 6th May, 1961, the licence had expired on the 31st December, 1960. He did not subsequently make the required payment until the 5th July, 1961. The renewed licence took effect from that date. Therefore at the time he issued the summons the appellant was not the person entitled to possession of the land. His action was premature. The action speaks from the date of the writ or summons in this case, and nothing occurring since the issue of the writ can be used to found a cause of action that did not exist at the time the writ was issued. The Court cannot even permit an amendment of the pleadings except by the consent of the parties which would so amend the writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time the writ was originally issued (see *Eshelby* v. *Federated European Bank Ltd.*) [4].

To recapitulate, therefore, in my view a Temporary Occupation Licence gives the holder thereof exclusive possession of the land the subject matter of the licence during the period for which the licence is expressed to be valid, that is to say from the date of issue to the 31st day of December of the year of issue. If the licence is renewed, the period for which the renewed licence gives exclusive possession to the licensee must, since a monetary payment is a condition precedent to the grant of any licence or renewal thereof, commence at the date when the payment is made. This is borne out by the receipt itself. The only date on it is the 5th July, 1962. That clearly indicates the date of the commencement of the renewal period.

The fact that the Land Office makes a licensee, whose licence has expired, pay the same amount as he would have to pay if he renewed the licence on the day that it did expire, that is to say on the 31st December, is in my opinion immaterial. It does not mean that the Collector by accepting the payment is doing any more than indicate that he does not propose in all probability to proceed against the person making the payment for unauthorised occupation of State land.

The learned President was right, therefore, in holding that at the time he instituted his action the appellant had no right to the possession of the land, and could not therefore have instituted an action for trespass against the respondent. The appeal must be dismissed and the appellant must pay the costs.

Appeal dismissed.

Solicitors: *Murugason & Co.; L. M. Ong.*

RATNAM v. CUMARASAMY & ANOR.

[C.A. (Hill Ag. C.J., Good J.A. and Suffian J.) July 18, 1962]

[K.L. — F.M. Civil Appeal No. 10 of 1962]

Practice and Procedure — R.S.C., O.58, r.22(6) — Appeal Record not filed in time — Application to Court of Appeal for leave to file Appeal Record dismissed — Whether order of Court of Appeal final or interlocutory.

Appeal to the Yang di-Pertuan Agong — Leave to — Appeal from the Supreme Court Ordinance, 1958, s.3(1).

An order refusing an extension of time to file the record of appeal is a final order for the purposes of appeal under section 3(1) of the Appeals from the Supreme Court Ordinance, 1958.

Text of Lord Alverstone in *Bozson* v. *Altrincham U.D.C.* [4] adopted.

Cases referred to:—

(1) *In re Page, Hill* v. *Fladgate* [1910] 1 Ch. 489.
(2) *Shubrook* v. *Tuffnell* (1882) 9 Q.B.D. 621.
(3) *Salaman* v. *Warner* (1891) 1 Q.B. 734.
(4) *Bozson* v. *Altrincham U.D.C.* [1903] 1 K.B. 547.
(5) *Isaacs* v. *Salbstein* [1916] 2 K.B. 139.
(6) *Cogstad* v. *Newsum* [1921] 2 A.C. 528.
(7) *Arnot* v. *Amber Chemical Co.* [1953] C.L.Y. 2719; *The Times*, May 20, 1953.
(8) *Shell Co. of the Federation of Malaya Ltd.* v. *Chairman, Municipal Council (No. 2)* [1961] M.L.J. 149.
(9) *Standard Discount Co.* v. *La Grange* (1877) 3 C.P.D. 67.
(10) *Collins* v. *The Vestry of Paddington* (1880) 5 Q.B.D. 368.

(11) *Price* v. *Phillips* 11 T.L.R. 86.
(12) *Isaacs & Sons* v. *Salbstein* [1916] 2 K.B. 139.
(13) *Peek* v. *Peek* [1948] 2 All E.R. 297.

COURT OF APPEAL.

A. L. Hills for the appellant.

R. Ponnudurai for the respondents.

Cur. Adv. Vult.

Good J.A.: This is an application for leave to appeal to the Yang di-Pertuan Agong against an order of this Court made on the 15th May, 1962, when we dismissed an application by the same applicant for leave to file the record of appeal out of time.

The applicant was the unsuccessful plaintiff in Civil Suit No: 511 of 1960 which was tried in the High Court by Ong J. The applicant filed a notice of appeal in time against the decision of Ong J. but he was out of time in filing the record of appeal under Order 58, rule 22(6).

The provisions governing leave to appeal are contained in section 3(1) of the Appeals from the Supreme Court Ordinance, 1958, and the relevant parts of that sub-section which have to be considered on the present application are:—

"……an appeal shall lie from the Court to the Yang di-Pertuan Agong with the leave of the court…… —

(a) from any final judgment or order in any civil matter where

(i) the matter in dispute in the appeal amounts to or is of the value of four thousand five hundred dollars or upwards;

……; and

(b) from any interlocutory judgment or order which the Court considers a fit one for appeal; ……".

The respondents' answer to this application is that it is an application for leave to appeal from an interlocutory order which is not a fit one for appeal. The applicant makes his application on the basis that the order against which he desires to appeal is a final order to which section 3(1)(a)(i) applies.

The question that we have to decide is whether our own order of the 15th May, 1962, which barred the applicant from appealing to us against the decision of the High Court, is final or interlocutory.

The question of when an order is final and when it is interlocutory is a vexed one which has been the subject of much anxious consideration by the Courts for a great many years. The earliest case to which we have had to refer was decided in 1877, but there were even earlier cases. The difficulty which Judges have found in deciding the question is well illustrated in the case of *In re Page, Hill* v. *Fladgate* [1]. In that case Cozens-Hardy M.R. prefaced his judgment by saying:—

"I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others."

Buckley L.J. began his judgment by saying:—

"The rules are so expressed and the decisions are so conflicting that I confess I am unable to arrive at any conclusion satisfactory to my own mind as to whether this is an interlocutory or a final order."

and concluded with the words:—

"But I desire to say that in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final."

The echoes of this *cri-de-coeur* are still heard 52 years later and 8,000 miles away.

Mr. Hills for the applicant referred us to five cases on this point: *Shubrook* v. *Tuffnell* [2]; *Salaman* v. *Warner* [3]; *Bozson* v. *Altrincham U.D.C.* [4]; *Isaacs* v. *Salbstein* [5]; *Cogstad* v. *Newsum* [6].

Mr. Ponnudurai for the respondent relied on *Salaman* and also referred us to an unreported case mentioned in item No. 2719 in the Current Law Year Book for 1953: *Arnot* v. *Amber Chemical Co.* [7]. He also cited the judgment of Thomson C.J. in *Shell Co. of the Federation of Malaya Ltd.* v. *Chairman, Municipal Council (No. 2)* [8] which was given in this Court on the 17th April, 1961. For the purposes of a decision on the present application, it is necessary to consider these cases.

I will begin by referring to a case which was not cited by counsel, *Standard Discount Co.* v. *La Grange* [9]. I do so because this case foreshadows the principle which gradually emerges from the line of cases cited. In it the Court of Appeal held that an order empowering a plaintiff to sign judgment upon a specially indorsed writ is an interlocutory and not a final proceeding. The *ratio decidendi* of this decision was stated by Bramwell L.J. as follows:—

"There cannot be an order which is neither final nor interlocutory; and therefore if the order before us is not final, it must be interlocutory. Is it a final order? It is like every other order in one sense final, so long as it is not appealed against, but it is not the final order of the Court in the cause, because in order to entitle the plaintiffs to levy execution there must be a subsequent direction by the Court. Therefore, I think it is an interlocutory order."

I now come to the case of *Shubrook* which, however, is not capable of being fully understood without reference to the earlier case of *Collins* v. *The Vestry of Paddington* [10]. The first paragraph of the headnote to *Collins* is as follows:—

"The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an 'interlocutory order' within the meaning of Rules of the Supreme Court, Order LVIII, rule 15, and an appeal from the decision must be brought within twenty-one days."

But in *Shubrook*, Jessel M.R. said that that was not what *Collins* decided but only that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. In *Shubrook* an action for damages had been referred to arbitration and the arbitrator had stated a case for the opinion of the Court. The Court's opinion was that judgment should be entered for the plaintiffs and it was thereupon ordered that the case be referred back to the arbitrator. The Court of Appeal held

that this was a final order. This case was not followed in *C.T. Cogstad and Co.* v. *R. Newsum Sons & Co. Ltd.* [6], but *Cogstad* is of doubtful value in the present discussion because the decision turned on the wording of the arbitrator's award and no principle of general application can be gathered from it. The next case, to which Mr. Hills very properly drew our attention although it appears to be against him, is *Salaman*. In that case there was an appeal from an order of the Divisional Court dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial. It was held that the order of the Divisional Court was not a final order within Order 58, rule 3, and that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will if it stands, finally determine the matter in litigation. Fry L.J. said at page 736:—

"I think that the true definition is this. I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

Shubrook and *Salaman* were both considered by the Court of Appeal in *Bozson*. In that case —

"An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the plaintiff appealed."

It was held by the Court of Appeal that the appeal was from a final order. The Earl of Halsbury L.C. after observing that the authorities were not in harmony said in respect of *Shubrook* and *Salaman*, without giving any reasons, "I prefer to follow the earlier decision." He was followed by Lord Alverstone C.J. who in a very brief judgment laid down the test for determining whether an order is final or interlocutory. He said:—

"I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In *In re Page* it was held that an order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order. Such an order would appear to be final if one applies the test stated by Lord Alverstone and the grounds on which it was held to be interlocutory are, with respect, far from convincing. Cozens-Hardy M.R. based the decision on three grounds:—

(a) that it had been the practice of the courts to treat these orders as interlocutory;

(b) that Chitty J. in *Price* v. *Phillips* [11] had refused leave to appeal against the dismissal of such an action because such actions should not be encouraged; and

(c) that it was, on public grounds and on grounds of good sense a matter of extreme importance that an appeal from an order dismissing an action as being frivolous and vexatious should be disposed of by the Court of Appeal, if disposed of at all, in the shortest possible time.

Fletcher Moulton L.J., who had been the leading counsel for the successful party in *Salaman's* case, speaking from his own recollection of that case said that in his opinion the decision in *Salaman* amounted to a decision that this was an interlocutory order. Buckley L.J. appeared to lean towards the contrary view, for he said:—

"I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order."

Speaking for myself and with the greatest respect I am unable to see that any cogent reasons have been advanced in *In re Page* to justify a departure from Lord Alverstone's test.

In *Isaacs & Sons* v. *Salbstein* [12] Swinfen Eady L.J. considered both *Shubrook* and *Salaman* and said:—

"Neither decision seems quite consistent with that in *Bozson* v. *Altrincham Council* which puts the matter on the true foundation that what must be looked at is the order under appeal."

That was an appeal from the Divisional Court to the Court of Appeal. The County Court had given a final judgment and the Divisional Court had made an order for a new trial. The Court of Appeal held that this was clearly an interlocutory order.

Finally, there was the case of *Peek* v. *Peek* [13] in which the Court of Appeal held that an order of the Divisional Court setting aside a decree nisi of divorce and directing a new trial was an interlocutory order within Order 58, rule 15. In that case Tucker L.J. at page 299 referred to the case of *Isaacs* and quoted the judgments of Halsbury L.C. and Alverstone C.J. in *Bozson* from the judgment of Swinfen Eady L.J. in *Isaacs*. He then went on to say:—

"In my view, that decision (i.e., the decision in *Isaacs*) governs this case, unless counsel for the husband is right in saying that a distinction should be drawn between it and the present proceedings."

It is clear therefore that the test laid down by Lord Alverstone in *Bozson* has been approved and followed by the Court of Appeal in subsequent cases though not in *In re Page*.

I now have to refer to the two cases cited by Mr. Ponnudurai for the respondents. It is a matter of regret that it is not possible to derive any assistance from *Arnot* because it is unreported and the report in *The Times* of May 20th, 1953, is not available. All that we know about it is that in the circumstances of that particular case an order dismissing an action for want of prosecution was for the purposes of appeal held to be an interlocutory order. On that bare knowledge I am unable to base any conclusion. The other case referred to by Mr. Ponnudurai was *Shell Co. of the Federation of Malaya* v. *Chairman, Municipal Council (No. 2)*. I do not think that this case affords us any help, as it is the present case in reverse. The High Court Judge had dismissed an appeal against an

assessment by the rating authority on the ground of a procedural defect in the filing of the notice of appeal. The order of the High Court put an end to the litigation and was clearly a final order according to Lord Alverstone's test. We disagreed with the view taken by the High Court Judge and the effect of our decision was to enable the appeal to the High Court, which had been barred *in limine* by the High Court Judge, to proceed. We removed the finality of the High Court order and in effect reopened the proceedings. When application was made to us for leave to appeal to the Yang di-Pertuan Agong, we decided that our order which it was desired to appeal against was an interlocutory order and as we did not consider it to be a fit one for appeal, we refused leave.

In the present case our order refusing an extension of time for the applicant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful plaintiff from appealing against the order of the High Court. Our order of the 15th May, 1962, is therefore for the purposes of appeal a final order against which the applicant may appeal as of right provided the value of the subject matter is not less than $4,500 (and as to that there is no dispute) and provided that he complies with the usual conditions as to security and the provision as to time.

I would allow the application with costs and give conditional leave to appeal on the appellant giving security for costs in the sum of $5,000 and filing the record within three months.

Hill Ag. C.J.: I agree with the judgment which my learned brother Good J.A. has just read. Out of a number of conflicting opinions and decisions that of Lord Alverstone in *Bozson's* case stands out as the one judgment that provides a real and practical test for determining whether an order is final or interlocutory and I too would apply it here.

Suffian J. concurred.

Application allowed.

Solicitors: *Donaldson & Burkinshaw; Rajendra & Teik Ee.*

Re PERTING TIMOR ELECTION (No. 2)

[C.A. (Hill Ag. C.J., Good J.A. and Suffian J.) July 18, 1962]

[K.L. — F.M. Civil Appeal No. 25 of 1962]

Election Offences Ordinance, 1954, s.33 — Appeal from Election Judge — Whether ss.36 and 37, Courts Ordinance, 1948 applicable.

Appeal — Right of appeal from interim or interlocutory order of Election Judge.

By virtue of section 33 of the Elections Offences Ordinance, 1954, an appeal from an Election Judge is an appeal from a special tribunal and therefore sections 36 and 37 of the Courts Ordinance, 1948, have no application.

There is no inherent right of appeal from the interim or interlocutory order of an Election Judge. The right of appeal in such cases must be expressly granted.

Cases referred to:—

(1) *Joseph Theberge* v. *Philippe Laudry* (1876-7) 2 App. Cas. 102, 106.

(2) *Lord Strickland* v. *Giuseppe Grima* [1930] A.C. 285, 297.

(3) *De Silva* v. *Attorney-General for Ceylon* [1949] W.N. 248, 249.

(4) *Senanayake* v. *Navaratne* [1954] A.C. 640, 651.

COURT OF APPEAL.

K. A. Menon for the appellant.

Henry Cheah for the respondent.

Hill Ag. C.J.: On the 28th May, 1962, an Election Judge made the following interim order in Election Petition No: 6 of 1961 between Kam Ah Chai, petitioner, and Chia Kia Poh, respondent:—

"Upon the petition of Kam Ah Chai also known as Chow Syh Kwong and upon a preliminary objection raised by the respondent to the jurisdiction of the Court to hear and dispose of this petition and upon hearing Mr. S. E. Teh of counsel for the petitioner and Mr. K. A. Menon of counsel for the respondent and upon reading the said petition and the affidavit of the petitioner filed the 25th day of October, 1961 and the affidavit of Chow Tek Noe filed the 25th day of October, 1961, And the Court being of opinion that under Regulation 11(5) of the Local Government (Conduct of Elections) Regulations, 1960, the decision of the Returning Officer was not final and conclusive so as to oust the jurisdiction of the Court to hear and determine this petition Doth overrule the said preliminary objection And the Court Doth Order that the State Secretary of the State of Pahang or any person appointed by the said State Secretary in that behalf do conduct a test to determine whether the respondent herein Chia Kia Poh is able to speak, read and write the Malay or English language with a degree of proficiency sufficient in the opinion of the said State Secretary or such other person appointed by him in that behalf, to enable him to take an active part in the proceedings of the Town Council of Bentong in accordance with Order 5(d) of the Town Council of Bentong Order, 1960 AND IT IS FURTHER ORDERED that the hearing of the Petition be resumed on a date to be fixed AND IT IS FURTHER ORDERED that costs be reserved."

On the 1st of June, 1962, the respondent filed notice of appeal against the above order and the matter now for consideration by this Court is a motion by the petitioner that the notice of appeal should be struck out on the ground that no appeal shall be brought by virtue of section 37(1)(d) of the Courts Ordinance, 1948.

The matter only presents difficulty because the order against which the appeal is lodged is an interim or interlocutory order made by the Election Judge in the preliminary stages of the hearing of the Election Petition. The learned Judge had not determined the issues set out in section 36 of the Election Offences Ordinance, 1954 (No: 9 of 1954) and had not certified his determination. If he had, such determination would be final according to this section and no appeal would lie for section 36 states *inter alia* "upon such certificate being given, such determination shall be final".

Part VII of the Election Offences Ordinance deals with Election Petitions. Section 33(1) reads as follows:—